Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1355

SCOTTY'S HOME BUILDERS AND
GENERAL INSURANCE COMPANY
OF AMERICA,

Petitioners,

versus

MATTHEW P. CUNNINGHAM AND
THE INDUSTRIAL RELATIONS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

HOWELL, KIRBY, MONTGOMERY,
D'AIUTO and DEAN
West Palm Beach, Florida 33402
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MATTHEW P. CUNNINGHAM AND THE INDUSTRIAL RELATIONS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners, Scotty's Home Builders and General Insurance Company of America, respectfully pray that a writ of certiorari issue to review the orders of the Supreme Court of Florida, quashing said orders and directing the Florida Supreme Court to consider and determine this case on its merits.

OPINIONS AND ORDERS BELOW

The order of the Florida Supreme Court, initially depriving Petitioners' of their constitutional rights, by denying their petition for writ of certiorari based upon *Scholastic Systems, Inc. v. Leloup* (Fla. 1975) 307 So.2d 166 is attached as Appendix C.

The subsequent order of the Florida Supreme Court denying Petitioners' Petition for Rehearing is attached as Appendix E. *

JURISDICTION

The order of the Supreme Court of Florida denying Petitioners' Petition for Writ of Certiorari based upon *Leloup* was entered November 8, 1974, and became final January 28, 1975 (Appendices D & E). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the Supreme Court of Florida was in error under the Fourteenth Amendment because it refused to review the Industrial Relations Commission's decision based upon *Leloup*, in essence violating Petitioners' due process right to certiorari review of an administrative decision as a matter of right?

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* Opinions and orders of the lower courts, prior to the first order of the Florida Supreme Court, are also attached in chronological order as follows: The original opinion of the Judge of Industrial Claims finding that Mr. Cunningham's accident did not arise out of and in the course of his employment and dismissing his workmen's compensation claim, rendered December 12, 1972, and not officially reported, is attached as Appendix A. The opinion of the Industrial Relations Commission reversing the Judge of Industrial Claim's finding and remanding the cause to the Judge of Industrial Claims for entry of an order in accordance therewith, rendered October 4, 1973, and not officially reported is attached as Appendix B.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment, United States Constitution, Amendment XIV, §1.

> "All persons born or naturalized in this United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

Petitioner Scotty's Home Builders was Mr. Cunningham's employer and Petitioner General Insurance Company of America was the employer's workmen's compensation carrier. Mr. Cunningham was allegedly injured at work and filed a claim for workmen's compensation. Petitioners denied the claim contending that Mr. Cunningham's accident and injury had not arisen out of and in the course of his employment. As a result of a hearing on the claim, the Judge of Industrial Claims ruled in Petitioners' favor (Appendix A).

Mr. Cunningham subsequently appealed to the Industrial Relations Commission, which reversed the Judge's finding and remanded the cause to the Judge of Industrial Claims for entry of an order consistent therewith (Appendix B).

Petitioners then filed a Petition for Writ of Certiorari with the Florida Supreme Court. That Court subsequently

entered an order denying the petition based upon the *Leloup* case. *Leloup* was a decision previously rendered by the Florida Supreme Court which held that the Industrial Relations Commission was a judicial rather than administrative body for purposes of the "due process" clause, and thus decisions of the Industrial Relations Commission satisfied the due process requirement that a party offeneded by the action of an administrative body be afforded the right of appeal to a judicial tribunal.

This being the case, the Florida Supreme Court in *Leloup* held that there was no constitutional requirement that decisions of the Industrial Relations Commission be reviewed by the Florida Supreme Court or that such review be in the manner of an appeal as a matter of right. It was held that henceforth decisions of the Industrial Relations Commission would be reviewed by the Florida Supreme Court upon traditional commonlaw certiorari grounds based upon a departure from the esssential requirements of law, rather than upon general appellate considerations.

Petitioners' Petition for Rehearing (Appendix D) was subsequently denied (Appendix E). Petitioners accordingly seek review of the orders of the Florida Supreme Court denying their claims to constitutional protection.

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court clearly thwarted Petitioners' due process right to judicial review of the Industrial Relations Commission's decision by denying their Petition for Writ of Certiorari based upon *Leloup*.

1. The Florida Supreme Court incorrectly reasoned in *Leloup* that the Industrial Relations Commission was a

judicial body and thus its decisions satisfied the due process requirement that a party offended by the action of an administrative body be afforded the right of appeal to a judicial tribunal. Therefore, the Florida Supreme Court held that a party was not entitled to judicial review of a Industrial Relations Commission decision.

The Florida Supreme Court's holding overlooks the fact that administrative agencies are just that, and not courts or part of the judicial system, or judicial bodies or tribunals in the strict sense. *Dickenson v. United States*, 74 Sup.Ct. 152, 346 U.S. 389, 98 L.Ed 132; *People v. Western Airlines, Inc.* 42 Cal.2d 621, 268 P.2d 723, 75 S.Ct. 87, 34 U.S. 859, 99 L.Ed. 677. Although an administrative body might be a "quasi-judicial tribunal", its orders are "administrative orders" as distinguished from "judicial decrees". *National Candy Co. v. Federal Trade Commission* (7th Cir. 1939) 104 F.2d 999, cert. den 60 S.Ct. 174, 308 U.S. 610, 84 L.Ed 517. *Watson Bros Transp. Co. v. Jaffa* (8th Cir. 1944) F.2d 340. Parties are entitled to judicial review of the decisions of an administrative body acting in a quasi-judicial capacity. *Harris v. Tobiner* (DC 1962) 304 F.2d 377, 113 US App.DC 10.

As pointed out in Justice Ervin's dissent:

> "I do not believe that an administrative review of a judge of industrial claims' order by the Industrial Relations Commission is the equivalent of an initial judicial review as contemplated by Article 1, Sections 9 (due process) and 21 (access to the courts) of the State Constitution.
>
> The Florida Industrial Relations Commission is the administrative—not the judicial-reviewer in the statutory echelon of the administrative structure for processing workmen's compensation

claims. It is not a judicial court of review. Chapter 20, F.S., the governmental reorganization act, prescribes for various administrative bodies with their lower boards and examiners, as well as their 'heads' and reviewers. Under Section 20.17 (4) F.S., the Industrial Relations Commission is placed under the supervision of the Department of Commerce.

The Industrial Relations Commission is a state agency unit but it is not a court. Under the definitions of agencies in Chapter 120, F.S. the Administrative Procedure Act, it is expressly declared in Section 120.21 (1) that:

> 'Agency means the governing body of any state board, commission or department, or state officer who constitutes the agency authorized by law to adjudicate any party's legal rights . . . except the legislature, courts, governor and the department of revenue.' (emphasis supplied.)

Under Section 1, Article V, State Constitution, the judicial power is vested in certain named courts and '[n]o other courts may be established . . . 'The Industrial Relations Commission is not a court.

All of the arguments in the majority opinion concerning the similarity of the Industrial Relations Commission and its personnel to courts and judges, respectively, supportive of the idea the Commission is a court are irrelevant and beside the point. The Commission is not a court under the Constitution and does not afford a direct judicial review to litigants in workmen's compensation cases."

2. The Florida Supreme Court incorrectly determined that certiorari review of the Industrial Relations Commission's orders was not as a matter of right. When, and

under what circumstances, judicial review of an administrative order is available are questions, apart from whatever requirements the constitution may take in certain situations, which depend on the particular legislative enactment under which judicial review is authorized. *N.L.R.B. v. Cheney Cal. Lumber Co.* (1946) 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed 739. Where the right of judicial review is granted, there must be compliance with the terms by which such right is authorized, and appeals must be prosecuted in accordance with requirements of the statutes allowing them. *Lautares v. Smith* (N.C. 1969) 308 F.Supp. 656; *Willow Crossing Dairy Farm, Inc. v. Hardin* (Pa. 1970) 327 F.Supp. 798.

While it is true that except where made so by constitutional provisions or by statute, certiorari is not a writ of right; it is also clear that, where so provided, review may be had by certiorari as a matter of right. See §73 CJS Public Administrative Bodies & Procedure §168; 14 CJS Certiorari §10; 14 Am.Jur.2d Certiorari §7.

Two examples of cases that have held certiorari to be a matter of right follow. In *Gallena v. Scott* (N.J. 1949) 64 A2d 77 the Supreme Court of New Jersey held that provisions of the new constitution and the statutory implementation made certiorari review a *matter of right* rather than discretionary.

In *Carlson v. McLyman* (RI. 1950) 74 A.2d 853 the Rhode Island Supreme Court held that a statute pertaining to a police officer who had been dismissed from duty provided for review of the dismissal by certiorari as a matter of right rather than subject to discretion.

Turning to the present case, applicable provisions of the Florida Constitution are: (1) Art.V §3 (b) (3), providing that the Florida Supreme Court "*may* issue writs of certiorari to commissions established by general law having statewide jurisdiction." (2) Act.V §3 (b) (7), providing that the Florida Supreme Court "[s]hall have the power of direct review of administrative action prescribed by law."

Applicable provisions of Florida's Workmen's Compensation Law are §440.25 (4) (d) F.S. and §440.27 F.S. Section 440.25 (4) (d) provides in part:

> "The order of the commission shall become final upon expiration of the period within which any interested party may file a petition for writ of certiorari requesting review of such order by the supreme court unless within said time any interested party *shall* file a petition for writ of certiorari in accordance with §440.27."

In pertinent part, §440.27 states:

> ". . . Orders of the commission entered pursuant to §440.25 *shall* be subject to review only by petition for writ of certiorari to the supreme court."

Thus, it can be seen that there is no constitutional provision or workmen's compensation provision limiting the availability of judicial revied by certiorari as a matter of right. Rather, it is merely stated that the method or manner of judicial review shall be by certiorari, without clarifying whether certiorari is to be discreationary or as a matter of right. Likewise is Florida Appellate Rule 4.1.

However, Florida's new Administration Procedure Act gives a party aggrieved by an administrative decision review by certiorari as a *matter of right.* §120.68 F.S. provides:

> "120.68 Judicial review.
>
> (1) A party who is adversely affected by final agency action *is entitled to* judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.
>
> (2) Except in matters for which judicial review by the supreme court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides. Review proceedings shall be conducted in accordance with the Florida appellate rules."

Subsection (1), *supra*, unequivocably states that everyone is entitled to judicial review as a matter of right. Subsection (2) does not limit or restrict subsection (1), but merely sets forth the manner in which review is to instituted (i.e.), by filing a petition for certiorari. Clearly, the act provides for review by certiorari as a *matter of right.* As stated in *School Bd. of Okaloosa County v. Richardson* (Fla. 1971) 332 F.Supp. 1263, only on a showing of clear and convincing evidence of contrary legislative intent should the court restrict access to judicial review of administrative agency action.

As shown *supra,* Act V §3 (b) (3) of the Florida Constitution provides that a petition for certiorari can be taken from a decision of the Industrial Relations Commission

and the Florida Supreme Court is given discretion in the issuance of the writ. However, the Administrative Procedure Act gives persons aggrieved by administrative decisions a remedy different from the one available to them under a petition for common law certiorari. In substance and effect it given an aggrieved party an additional remedy, namely a *right* to review by certiorari.

Again, as pointed out in Justice Ervin's dissent in the present case, the Florida Supreme Court has in the past afforded review of the Industrial Relations Commission's decisions that was equivalent to direct appeal, notwithstanding the fact that review by the Florida Supreme Court was labeled as certiorari in §440.27 F.S. *supra*. Justice Ervin emphasized the importance of providing direct and full review in workmen's compensation cases, particularly since millions of workmen are relegated to seeking recovery solely through workmen's compensation in lieu of any civil or common law action they might have had:

> "I am unable to agree that this Court, or in lieu of this Court another appellate court, should only give litigants in workmen's compensation cases a lessened appellate review than that which has been heretoforce afforded them. Adequate consideration of workmen's compensation claims should include direct judicial review consideration. To give them only a conflict certiorari review or common law certiorari review of compensation orders is constitutionally impermissible —failing to afford appellate due process.
>
> Administrative or bureaucratic processes affecting the in lieu civil claims of thousands of workmen should not be short circuited by permitting only a limited certiorari review instead of a direct

> judicial review. A direct judicial review of compensation orders as a matter of right is necessary to safeguard the constitutional rights inherent in remedy cases, similarly as in civil cases where recovery of a contractual obligation or tort claim is involved."

CONCLUSION

The Florida Supreme Court's failure to observe the guarantees of the Fourteenth Amendment by holding that judicial review by certiorari of decisions of the Industrial Relations Commission is not a matter of right requires this Court's corrective action. If the constitutional guarantee of due process is to mean anything, this decision of the Florida Supreme Court must be reviewed.

For the reasons stated, the petition should be granted.
April 25, 1975.

Respectfully submitted,

EDNA L. CARUSO,

HOWELL, KIRBY, MONTGOMERY,
D'AIUTO and DEAN
P. O. Drawer 3626
West Palm Beach, Florida 33402
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Dudley Burton, 1008 Concord Building, 66 Flagler Street, Miami, Florida, 33130, Attorney for Respondent Cunningham, and Mrs. Verna Martin, Industrial Relations Commission, Ashley Building, 1321 Executive Center Drive, Tallahassee, Florida, by mail, this 25th day of April, 1975.

By_____
EDNA L. CARUSO

APPENDIX A

STATE OF FLORIDA
DEPARTMENT OF COMMERCE

Division of

LABOR AND EMPLOYMENT OPPORTUNITIES
BUREAU OF WORKMEN'S COMPENSATION

Claim No. 261 94 9706 Date of Accident: June 13, 1972

Employee:

MATTHEW P. CUNNINGHAM
Route 2, Box 275
Punta Gorda, Florida 33950

Represented by:

DUDLEY BURTON, ESQUIRE
1008 Concord Building
66 Flagler Street
Miami, Florida 33130

Employer:

SCOTTY'S HOME BUILDERS
4235 Palm Beach Blvd.
Fort Myers, Florida 33901

Carrier:

GENERAL INSURANCE COMPANY OF AMERICA
P. O. Box 13089
St. Petersburg, Florida 33733

Represented by:

WARREN C. ROSE, ESQUIRE
500 First Avenue, North
St. Petersburg, Florida 33701

COMPENSATION ORDER

OF

JUDGE OF INDUSTRIAL CLAIMS

THE CAPTIONED MATTER came before the Court at Fort Myers, first on July 21, 1972, at which time testimony of various witnesses was taken, and again on August 4, 1972, when the claimant, a quadriplegic, was physically able to testify and his testimony was taken before the Court at Lee Memorial Hospital. Subsequently, depositions were filed.

In accordance with employee's request, the case was calendared for hearing at the earliest possible date at Fort Myers because of the seriousness of the employee's condition. Claim was filed on June 28, 1972, and on July 11, 1972, Notice to Controvert was filed.

The parties stipulated to the following matters of fact and these stipulations the Court confirms as findings: Jurisdiction rests in the Department of Commerce; notices of accident and hearing were duly given; venue lies in Lee County, Florida; the employee's average weekly wage, $50.00; appropriate compensation rate, $30.00; an accident in which the employee was injured occurred on June 13, 1972; no benefits had been paid as of the date of the first

hearing, nor subsequent thereto; no medical benefits have been paid; the testimony of the employee would be taken at Lee Memorial Hospital before the Court; testimony would be taken and transcribed by a qualified court reporter; in addition to the witnesses heard before the Court, depositions would be taken of David J. Bryant and John Varner; and while it was not stipulated to formally, the parties agreed that the employee was, at the time of hearing, temporarily totally disabled.

The employee claimed that he was entitled to temporary total disability benefits; to reimbursement for medical expenses incurred; and for continuing medical care and attention until date of maximum medical improvement, which was in the distant future. Claim was also made for costs, interest and attorney's fees.

The employer defended the claim on the ground that there was no causal connection between the employment and the accident in which the employee was injured; and, alternatively, that the accident did not arise out of and in the course of Matthew Cunningham's employment by Scotty's Home Builders.

The testimony of Edgar Long, manager of Scotty's Home Builders, and of Bill Campbell, a fellow employee of Mr. Cunningham, who was the driver of the motor vehicle in which Mr. Cunningham was injured, was taken before the Court on July 21, 1972. As noted, the testimony of Matthew Cunningham was taken at Lee Memorial Hospital before the Court. The testimony of John Varner, another employee of Scotty's Home Builders, and of David J. Bryant, assistant to the manager, Edgar Long, was presented to the Court by deposition. No medical testimony was offered.

Medical reports in the file of the Bureau indicated the employee to be quadriplegic as the result of an injury to the cervical spine. The man was hospital-confined.

The issue to be determined by the Court was whether or not the employee was injured in an accident arising out of and in the course of employment.

In addition to the findings hereinbefore set forth, the Court finds that Matthew Cunningham had been employed on a part-time basis by Scotty's Home Builders on U. S. 41 South, Fort Myers, Florida, for approximately three weeks, working with a crew of ten to twelve others, including management personnel, preparing a new retail outlet for opening on or about July 1, 1972.

On June 13, 1972, at approximately 4:45 p.m., Mr. Cunningham and a fellow employee, Bill Campbell, in Mr. Campbell's Volkswagon, left the premises of Scotty's Home Builders to drive to a 7-Eleven within a few blocks of Scotty's to buy sandwiches and drinks, and on their return trip, the Volkswagon was struck by a southbound vehicle and Mr. Cunningham was injured. There was no deviation from the direct route from Scotty's Home Builders to the 7-Eleven and their return to the point of impact.

The site of the employer's business and U. S. 41 or the Tamiami Trail, south of Fort Myers. U. S. 41 is a four-lane Highway, with a median strip between north and southbound lines. Traffic enters and leaves the employer's premises from a drive directly to U. S. 41, or from a drive leading to Palm Avenue. There is little choice in the distance or directness of the route of exit, for traffic intending to go south on U. S. 41, as Campbell and Cunningham did. The route of return is in the eastern or northbound lanes, turning into the median crossover at Palm Avenue and crossing the two southbound (west) lanes of traffic, and proceeding a few hundred feet along Palm Avenue to the drive entrance to Scotty's premises. This was the logical and direct route to be followed. U. S. 41 south of Fort Myers is a busy thoroughfare, the arterial leading south from Fort Myers to various towns in south Lee County, in Collier Country, principally Naples and its satellite communities, Alligator Alley, and eventually the lower east coast at Fort Lauderdale or Miami. This is a public highway, constructed as are many four-lane roads. No traffic control signal is operating at this junction. The junction is not a four-way intersection, because Palm Avenue does not extend eastward beyond U. S. 41, so that traffic moving, either entering from Palm Avenue or exiting, must turn right or left.

Five photographs showing the street and highway and location of the employer's premises were offered in evidence. They were taken some seven weeks later than the accident, but it is stipulated that the physical features, as depicted, are essentially as they were at the time of the accident. The Court finds that insofar as the means of access to the employer's premises, they present no greater hazard than are presented to the public at large traveling to and from work, and that the approaches present no hazard of a nature which is peculiar to the employment in which the employee was engaged.

Mr. Cunningham, in addition to his part-time work with Scotty's Home Builders, was enrolled as a student at Edison Junior College, devoting his morning to school, and reporting for duty at Noon, five days a week, and

working until 5:30 p.m. those days; on Saturdays his work commenced at 7:30 a.m. and terminated at 4:00 p.m. Employees were required to make use of a time clock.

On June 13, 1972, Mr. Cunningham was taking term final examinations. He had not eaten breakfast before going to school, nor did he get lunch before reporting for work. Upon reporting, he was assigned by Mr. Bryant to work with Bill Cambell in completing the painting of a carpet display rack. The two of them occupied themselves until approximately 4:45 p.m. on this job. At that time a summer shower blew up and they, with a third employee, John Varner, went out to close the windows of their automobiles; and as a courtesy to fellow employees, closed the windows of all of the cars.

They finished at Bill Campbell's car. At that point, a discussion came up about going to the 7-Eleven for the sandwiches. Both Cunningham and Campbell testified that Mr. Varner started to go with them and then decided otherwise, electing to return to work he had in progress in the warehouse. Mr. Campbell, in his testimony, stated that he and Mr. Cunningham had earlier in the afternoon discussed hurrying the completion of their painting job, so that they could go for a snack. There is no evidence as to which of the two was the originator of the idea. Neither Cunningham nor Campbell requested permission of anyone to make the trip. The two young men agree that when Mr. Varner declined to join them on their trip, that jokingly one or the other said that nobody had asked him to go. The significance of this will be pointed up subsequently in this Order.

The "chain of command" was not clearly defined, at least in part because of the newness of the organization;

the fact that Edgar Long was Scotty's manager was recognized by all, and in his absence that David Bryant was in charge. John Varner had come to the Fort Myers store from service with Scotty's in Sarasota and he, as an experienced employee, had the younger men, both Campbell, Cunningham and other employees, working with him and under his direction. He had been hired to be a truck driver and was working primarily in the warehouse, but on this particular day, he was putting together a display of building materials, some forty or fifty feet away from the painting work in progress. He had no connection with or responsibility for this particular piece of work.

The employee testified that he regarded John Varner as his supervisor-employee, having authority to direct his work. The testimony of the manager and the assistant manager is that Mr. Varner was another employee, with no authority of a supervisory nature — that he was employed to be a truck driver and warehouseman. The employee, Bill Campbell, testified that he considered Mr. Varner as having had more experience and greater seniority, was assigned to supervise specific activities about the plant, and that on one occasion he had been assigned to go with Mr. Varner to dump trash which had accumulated on the premises, working under Mr. Varner on that project. Mr. Varner, himself, testified that he had, in the course of working with the younger and less experienced employees, directed or instructed them in methods.

The Court finds that John Varner was not charged with any responsibility nor accorded any supervisory authority over the claimant, and that, particularly on the day of the accident, both Mr. Long and Mr. Bryant, his assistant, were on the premises, and that the employees,

Campbell and Cunningham, had taken their orders on work to be performed from Mr. Bryant. The Court's finding in this respect is reinforced by the fact that both Campbell and Cunningham jokingly informed Mr. Varner that he had not been invited to join them on their expedition. The Court does not regard it of any significance that he did or did not accompany them. The Court finds that he had neither the authority to authorize or consent to their trip by his silence, nor the authority to have directed them not to leave the premises. The Court does find it significant that with regard to whether or not Mr. Varner would accompany them, Campbell and Cunningham treated him as an equal, and in no way considered it necessary to have his approval or consent.

The employees, Varner, Campbell and Cunningham, had gone onto the parking lot on an errand clearly arising out of and in the course of their employment—to-wit: the closing of the windows of employee's cars because of a shower. However, except for the few minutes required for this activity, the rain shower in no way interferred with or required the suspension of the work upon which they were engaged.

There is no testimony contained in the record that, by custom or practice, employees were permitted to leave the premises for snacks or otherwise. In fact, to the contrary witness, David Bryant, testified that in his interviews with prospective employees, he made it a point to advise them that they were not to leave the premises during working hours, but that he did not recall whether or not Mr. Cunningham had been so instructed. The only testimony revelant to departures during the working day, other than on company errands, was that employees could leave the premises for lunch, checking out on the time

clock, the period being between 11:00 a.m. and 2:00 p.m. Since Mr. Cunningham came on at Noon, this did not particularly affect him.

Mr. Cunningham testified that on no occasion had he left the premises on a personal errand during working hours previously. He testified that twice during the period of his employment he had called Mr. Long to advise him that his load of school work necessitated his being absent.

With the exception of testimony as to the status of John Varner, the Court finds no material discrepancies in the testimony of the witnesses, either in those testifying directly before the Court or on deposition.

It is the Court's finding that as to John Varner, such supervisory authority as he had over other employees was limited to that specifically assigned to him by either the manager or his assistant to accomplish specific jobs. It follows, therefore, that his presence at the time Campbell and Cunningham left the premises in no way suggested implied or tacit approval of their trip. The Court has also noted the fact that the hour of departure was between 4:45 and 5:00 p.m.; that the employee would have worked throughout the afternoon and was within thirty or firty-five minutes of the close of the day at the time he elected to leave the premises with Mr. Campbell for refreshments.

The record reflects that, while there was no solid food on the premises of Scotty's soft drinks and coffee were available. There is nothing in the record which reflects that the purpose of the employee, in making his trip, was for the benefit of anyone except himself — that it was a purely personal errand, affording no benefit to his employer. The Court finds, therefore, that the errand upon which the employee embarked at 4:45 p.m. in no way

advanced the interest of the employer, and that it did not arise out of or in the course of his employment.

The Court had the opportunity of observing three of the witnesses, including the claimant, their demeanor, and to judge their reliability as witnesses, taking into account self-interest and other revelant factors. The Court is of the opinion that the witnesses were fair and frank in their testimony, and were truthful in their statements of fact. The Court has disregarded opinions and conclusions for which there was no factual basis. Based upon the findings heretofore set forth, it is, upon consideration, therefore

ORDERED that the claim of the employee, Matthew P. Cunningham, be and it is hereby denied, and the employer/carrier is relieved of liability for compensation benefits.

DONE AND ORDERED at Lakeland, Polk County, Florida, this 12th day of December, 1972.

L. F. BLANK
Judge of Industrial Claims

THIS IS TO CERTIFY that the foregoing Order was entered on the 12th day of December, 1972, and that a copy thereof was sent on said date by certified mail to the claimant and the employer, and by regular mail to all other interested parties, at the last known address of each.

CATHERINE F. MICIER
Secretary to the
Judge of Industrial Claims

APPENDIX B

State of Florida

INDUSTRIAL RELATIONS COMMISSION

MATTHEW P. CUNNINGHAM
Appellant,

versus

SCOTTY'S HOME BUILDERS
GENERAL INSURANCE COMPANY
OF AMERICA
Appellees.

Claim No. 261-94-9706

Date: 6-13-72

DUDLEY BURTON, MIAMI
Appellant,

EARLE, CAREY AND YANCHUCK
ST. PETERSBURG
Appellees.

ORDER

SLEPIN, Chairman.

This cause comes before the Industrial Relations Commission upon the claimant's application for review of the

Judge of Industrial Claims' Order dated December 12, 1972, wherein the claim was denied.

The appellant asserts five points on appeal:

1. Where a claimant and a co-employee take a break with the implied permission of their immediate superior to obtain food during which time both employees are being paid by employer and during such break an accident is sustained by them, does this accident arise out of and the course of their employment?

2. Does an employee that has not eaten for approximately twenty-four hours and has obtained food to tide him over to complete his day's work for his employer and during such time of eating sustains an accident, does such an accident arise out of and in the course of his employment?

3. Where an employee has an accident during normal working hours on public property adjacent to his employer's premises does such accident arise out of and in the course of his employment?

4. Where a claimant during normal working hours has an accident while proceeding on the normal route to the entry of his employer's premises does he sustain an accident arising out of and in the course of his employment within the meaning of the Florida Workmen's Compensation Law?

5. Where a Judge of Industrial Claims fails to make findings of facts on all issues and makes incorrect findings based on the record before him should the Order be remanded?

This cause concerns an employee, now a paraplegic in consequence of the industrial accident now before us,

who worked for the employer five days a week from noon to 5:30 p.m. and on Saturdays from 7:30 a.m. until 4:00 p.m., otherwise engaged as a student at Edison Junior College. Claimant, having taken examinations the morning of the date of the accident, had gone without any food since the day before and, *after racing to the parking lot* of the employer along with co-employee Campbell and senior employee Varner in order to raise car windows, went with Campbell down the highway immediately adjacent to the employer's business in order to secure from the Seven-Eleven Store a sandwich and drink. The record reflects that there were no posted instructions prohibitive of such departures from the premises, and the record further reflects the manager's testimony specifically to the point that claimant had never been instructed that he was to punch the time clock upon departure from the premises. The record reflects no prohibition whatsoever of departure from the premises by any employee upon compliance with the punch-out procedure (which procedure had not been relayed to the claimant, according to the record). On the date of accident the claimant and his co-employee took what amounted to a refreshment-break at a late hour in the afternoon, but the record reflects no time limitations promulgated by the employer respecting the coffe-breaks or refreshment-breaks. It was after departure for the refreshment-break and upon return from the Seven-Eleven Store just down the highway to the employer's place of business, while leaving busy Highway 41 abuting said business, that claimant was injured and transformed into a paraplegic when his co-employee's car was contacted by another car on the highway.

The learned Judge of Industrial Claims has written a highly explanatory Order. In the opinion of this Com-

mission, however, the Order departs from the principle stated often by our Supreme Court:

> . . . a principle inherent in our Workmen's Compensation Act is that it should be *liberally construed;* and 'when doubt exists, such doubts are always resolved in favor of the workingman.' *Florida Game & Fresh Water Fish* Commission v. Driggers, Fla. 1953, 65 So.2d 723, 725 . . . *Naranja Rock Co. v. Dawal Farms*, 74 So2d 282, 286-287 (Fla. 1954).

This principle, virtually a polestar of the workmen's compensation jurisprudence of this state, would seem to be operative in the instant cause.

Reasonable attendance by the employee to his personal comfort while otherwise engaged in the service of his employer, together with the full recognition by a perceptive judiciary that the coffe-break or refreshment-break as well as the lunch-break are conducive to the facilitation of that employment, even as we have escaped the "sweatshop" mentality of an earlier age, has synthesized in our jurisprudence to operate in favor of compensability in a proper case rather than to result in a "shallow, form over substance" analysis. Drawing upon the words of Shakespeare, it is not amiss to ask:

> Hath not an employee eyes? Hath not an employee hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as everyone else is? If you prick them, do they not bleed? If you tickle them, do they not laugh? If you poison them, do they not die? . . . [1]

[1] See, *The Merchant of Venice*, William Shakespeare, Act III, Scene I (63).

In the instant cause the claimant opted for a refreshment-break, which had not been prohibited, at an hour of his choosing, which was not in violation of any rule known to him or declared in or by the record on appeal. Moreover, claimant opted to take that *break off the premises*, which was a decision never interdicted by any notice (oral or written) to claimant that he was not free so to do. Claimant was injured, and transformed into a paraplegic, at the immediate entrance to his place of employment which abutted a busy highway while returning from the near-by store from which he had purchased a sandwich and drink. *The Order on appeal must be reversed and the cause remanded to the Judge of Industrial Claims for entry of an Order of compensability of such magnitude as the Judge of Industrial Claims shall determine in light of the authority hereinafter cited*, among others: *Naranja Rock Co. v. Dawal Farms*, 74 So.2d 282 (Fla. 1954); *Johnson v. Koffee Kettle Restaurant*, 125 So.2d 297 (Fla. 1961); *Armstrong v. Lowery Electric Co.*, 5 FCR 320 (1965), cert. den., 175 So.2d 529; *Fernandez v. Consolidated Box Co.*, 249 So.2d 434 (Fla. 1971); *Reynolds v. Ferman Oldsmobile Co.*, 259 So.2d 133 (Fla. 1972); *Hopewell v. Jim Jernigan's Studio*, I.R.C. Order 2-2005 (May 15, 1972); *Stone v. Tuscawilla Club, Inc.*, I.R.C. Order 2-2232 (Feb. 7, 1973).[2]

Because the Order on appeal is, as hereinbefore declared, reversed and remanded to the Judge of Industrial Claims for entry of an Order consistent with the principles hereinbefore enunciated, the employer herein, Scotty's Home Builders, by and through its insurance carrier,

[2] See also, *Pacheco v. Orchids of Hawaii*, 502 P.2d 1399, (Hawaii 1972), for an insightful view of the value and institutional status of refreshment-breaks and personal missions of employees.

General Insurance Company of America, pay to counsel for the claimant the sum of Five Hundred Dollars ($500.-00) for appellate services before this Commission.

It is so ordered.

INDUSTRIAL RELATIONS COMMISSION

STEPHEN MARC SLEPIN, Chairman

JESSE J. McCRARY, JR., Commissioner

COLEMAN, Commissioner, Dissenting:

My *colleagues have apparently strayed from the legal point* in this case, which is whether or not there is competent substantial evidence in the record which accords with logic and reason to sustain the Order of the Judge of Industrial Claims that the Appellant's accident resulting in his injuries did not arise out of and in the course of his employment. The questions as stated by Appellant are not proper objective statements of the real issues presented to this Commission for disposition by the application for review. For example, the assumptions made in Appellant's questions I and II are contrary to the findings of fact as made by the Judge on the basis of competent substantial evidence presented to him. The majority opinion appears to have accepted these assumptions in arriving at an erroneous conclusion.

There was no "customary" type of break in existence at the premises where the Appellant was employed nor is there anything in the record to show implied permission of the employer to leave the premises to take a break during regular working hours.

The second point would imply that the employee had been at work or deprived from eating (or perhaps from taking a break) by his employer for twenty-four hours, whereas, the evidence shows that the employee (Appellant) had only been on the job approximately four hours. Certainly the employer is not responsible for his failure to eat or drink for the time in excess of twenty hours prior to his reporting for work.

The fact that the Appellant is now a paraplegic is unfortunate and deserves the human sympathy of all normal, rational human beings, but the extent of the Appellant's injuries is not one of the questions before this Commission. The majority opinion's reference to the pitiful condition of Appellant and to the "sweat-shop" mentality seems out of tune with an objective consideration and disposition of the legal question of whether or not the acrident causing Appellant's injuries arose out of and in the course of his employment.

The resolution of doubt principle which properly should be applied in workmen's compensation cases and which is recognized and approved by this Commissioner as established by the *Florida Game & Fresh Water Fish Commission v. Driggers* case, supra, however such principle does not require the Judge of Industrial Claims to extend the "premises" doctrine, which the Judge properly did not do in the case *sub judice*. Nor does such principle require an extension of the personal comfort doctrine.

The majority makes the finding on page 2 that "the record reflects that there were no posted instructions prohibitive of such departures from the premises." The record also reveals that at the time of the initial interview with all employees, each applicant was given a check list setting

forth the employer's policies with regard to employees leaving the premises during working hours (57A-14), also that Appellant had worked for Appellee previously in Punta Gorda, Florida. The Appellant in this cause is not an illiterate, but a 21-year old college student.

The majority opinion again refers to the fact that the Appellant is a paraplegic at page 5. This is part of a pattern shown on page 4 where the majority makes reference to "recognition by a perceptive judiciary that the coffee-break or refreshment-break as well as the lunch-break are conductive to the facilitation of that employment, even as we have escaped the 'sweatshop' mentality of an earlier age." Careful search of the record reveals no evidence whatsoever of "sweatshop" conditions depicted at the premises of the employer/appellee in the case *sub judice*. Thus, there is no basis for portraying an image of "sweatshop" conditions.

The essential facts as found by the Judge in his Order are: on page 4, after discussing the facts concerning the departure by the Appellant and others, the Judge found —

> . . . that insofar as the means of access to the employer's premises, they present no greater hazard than are presented to the public at large traveling to and from work, and that the approaches present no hazard of a nature which is peculiar to the employment in which the employee was engaged.

The record amply supports this finding. On page 5, after discussing the plans of the Appellant and others to obtain a snack, the Judge found "neither Cunningham nor Campbell requested permission of anyone to make the trip."

The Judge than found, on page 7:

> John Varner was not charged with responsibility nor accorded any supervisory authority over the claimant, and that, particularly on the day of the accident, both Mr. Long and Mr. Bryant, his assistant, were on the premises, and that the employees, Campbell and Cunningham (Appellant) had taken their orders on work to be performed from Mr. Bryant. The Court's finding in this respect is reinforced by the fact that both Campbell and Cunningham jokingly informed Mr. Varner that he had not been invited to join them on their expedition. The Court does not regard it of any significance that he did or did not accompany them. The Court finds that he had neither the authority to authorize or consent to their trip by his silence, nor the authority to have directed them not to leave the premises. The Court does find it significant that with regard to whether or not Mr. Varner would accompany them, Campbell and Cunningham treated him as an equal, and in no way considered it necessary to have his approval or consent.

There is ample evidence in the record to sustain the foregoing findings of the Judge, such evidence accords with logic and reason and this Commissioner has no authority to substitute his own views or findings in lieu thereof.

Further on the Judge found:

> There is no testimony contained in the record that, by custom or practice, employees were permitted to leave the premises for snacks or otherwise. In fact, to the contrary, the witness, David Bryant, testified that in his interviews with prospective employees, he made it a point to ad-

vise them that they were not to leave the premises during working hours, but that he did not recall whether or not Mr. Cunningham had been so instructed. The only testimony relevant to departures during the working day, other than on company errands, was that employees could leave the premises for lunch, checking out on the time clock, the period being between 11:00 a.m. and 2:00 p.m. Since Mr. Cunningham came on at noon, this did not particularly affect him.
Mr. Cunningham testified that on no occasion had he left the premises on a personal errand during working hours previously. He testified that twice during the period of his employment he had called Mr. Long to advise him that his load of school work necessitated his being absent.

The foregoing findings as quoted from the Judge's Order are well-founded by competent substantial evidence in the record.

The basic dispositive findings of the Judge then appear on page 9 of the record of his Order as follows:

The record reflects that, while there was no solid food on the premises of Scotty's soft drinks and coffee were available. There is nothing in the record which reflects that the purpose of the employee, in making his trip, was for the benefit of anyone except himself—that it was purely personal errand, affording no benefit to his employer. The Court finds, therefore, that the errand upon which the employee embarked at 4:45 p.m. in no way advanced the interest of the employer, and that it did not arise out of or in the course of his employment.

The Court had the opportunity of observing three of the witnesses, including the claimant, their demeanor, and to judge their reliability as witnesses, taking into account self-interest and other relevant factors. The Court is of the opinion that the witnesses were fair and frank in their testimony, and were truthful in their statements of fact. The Court has disregarded opinions and conclusions for which there was no factual basis. Based upon the findings heretofore set forth, it is, upon consideration, therefore . . .

The foregoing comments and references of facts are buttressed by testimony in the record which may also be found as follows: 57B-3; T-18, that the employee, Varner, was not the supervisor of and had no authority over the Appellant, T-18; 57A-19; 57C-4; 57C-20; T-51.

The case of *Naranja Rock Co. v. Dawal Farms*, supra, is clearly distinguishable from the circumstances and facts in the case *sub judice*.

All enlightened individuals agree with and accept the "reasonable" attention to comfort doctrine and the Appellee/employer in this cause provided comfort on the premises and allowed reasonable attention to comfort requirements, but did not authorize departure from the premises solely for personal reasons, or without punching out on the time clock. I would affirm the Order of the Judge of Industrial Claims.

S E A L

This is to certify that on this Oct. 4, 1973, the above Order was filed in the office of the Industrial Relations Commission at Tallahassee and a copy sent by certified mail to each interested party at his last known address.

INDUSTRIAL RELATIONS
COMMISSION

By .....
V. MARTIN
Clerk

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1974

FRIDAY, NOVEMBER 8, 1974

SCOTTY'S HOME BUILDERS AND
GENERAL INSURANCE COMPANY OF
AMERICA,
Petitioners,

versus

MATTHEW P. CUNNINGHAM AND THE
INDUSTRIAL RELATIONS COMMISSION
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs and argument of counsel for the respective parties, to review the order of the Industrial Relations Commission and the Court finding no departure from the essential requirements of law, it is ordered that said petition be and the same is hereby denied. See: Scholastic Systems, Inc., et al. vs. LeLoup, et al., case no. 45,320, opinion filed October 24, 1974 in this Court.

ROBERTS, Acting Chief Justice, ERVIN, McCAIN and OVERTON, JJ., concur BOYD, J., dissents

A True Copy

CC: Hon. Verna Martin, Clerk

TEST:

Hon. James T. Earle

Hon. Dudley Burton

Hon. Verna Martin, Clerk

Sid J. White
Clerk Supreme Court.
By: Kay D. Yert,
Deputy Clerk

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

CASE NO. 44,546

INDUSTRIAL RELATIONS COMMISSION

SCOTTY'S HOME BUILDERS AND
GENERAL INSURANCE COMPANY OF AMERICA,
Petitioners,

versus

MATTHEW P. CUNNINGHAM AND THE
INDUSTRIAL RELATIONS COMMISSION,
Respondents.

PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF FLORIDA

The Petitioners, SCOTTY'S HOME BUILDERS and GENERAL INSURANCE COMPANY OF AMERICA, present this Petition for Rehearing and respectfully represent:

1. That on November 8, 1974, this Honorable Court abused its sound judicial discretion when it entered its Order in this cause denying the Petitioners' Petition for Writ of Certiorari, basing that denial solely upon the decision entered by this Honorable Court on October 24, 1974, in the case of *Scholastic Systems, Inc., et al vs. LeLoup, et al*, Case No. 45,320.

2. That the Petitioners, pursuant to Article V, Section 3, of the Florida Constitution, Florida Statute 440.27 and Rule 4.5 of the Florida Appellate Rules, timely filed with this Honorable Court a Petition for Writ of Certiorari seeking to have reviewed an Order entered by the Industrial Relations Commission of the Florida Department of Commerce on October 4, 1973, in Claim No. 261-94-9706; that by that Order the majority of the members of the Industrial Relations Commission of the Florida Department of Commerce had reversed the Order that had been entered by the Judge of Industrial Claims on December 12, 1972; that the Order that had been entered by the Judge of Industrial Claims on December 12, 1972, had denied to the Respondent, Matthew P. Cunningham, workmen's compensation benefits based upon the findings of fact that at the time of the happening of the accident the Respondent was on a purely personal errand away from the premises of the Petitioner, without the knowledge and consent of the Petitioner, and that that errand afforded no benefit to the Petitioner and that, therefore, and as a matter of law, that accident had not arisen out of and in the course of the Respondent's employment by the Petitioner; that, and although those findings of fact were supported by competent and substantial evidence which comported with reason and logic, as observed by Justice Overton during oral argument, and although that ruling of law in complete agreement with the many decisions that had been

entered by this Honorable Court, as observed by Justice Boyd during oral argument, the majority of the members of the Industrial Relations Commission of the Florida Department of Commerce re-weighed and re-evaluated the evidence and then substituted their view of the evidence for that of the Judge of Industrial Claims and then, and after philosophizing by quoting from Shakespeare's *Merchant of Venice* relating to the status of the working man in today's society, directed that an Order be entered by the Judge of Industrial Claims awarding benefits to the Respondent; that, therefore, that action of the majority of the members of the Industrial Relations Commission of the Florida Department of Commerce did, and does, constitute a departure from the essential requirements of law and that departure from the essential requirements of law should not be permitted to stand; that that departure from the essential requirements of law was called to the attention of this Honorable Court in the Petition for Writ of Certiorari and the supporting Briefs that were filed by the Petitioner in this cause with this Honorable Court; that, however, this Honorable Court, based solely upon its decision that was entered after oral argument was had in this cause in the case of *Scholastic Systems, Inc., et al vs. LeLoup, et al*, supra, denied the Petition for Writ of Certiorari; and that, it is most respectfully submitted that that denial of the Petition for Writ of Certiorari, in view of the above and foregoing facts and circumstances, constitutes an abuse by this Court of its sound judicial discretion and, therefore, that denial of the Petition for Writ of Certiorari should be reconsidered and reversed.

3. In the majority opinion entered by this Honorable Court in the case of *Scholastic Systems, Inc., et al vs. LeLoup, et al*, supra, this Honorable Court commented

upon how the legislature has, since 1971, upgraded the status of the Industrial Relations Commission to the level of an appellate court. Although the salary of the members of the Industrial Relations Commission is now equal to that paid to the Judges of the District Courts of Appeal and although the members of the Industrial Relations by law for Judges of the District Courts of Appeal, does that mean that the members of the Industrial Relations Commission are incapable of committing serious error? Obviously not. Article V, Section 3, of the Florida Constitution recognizes that the Judges of the District Courts of Appeal can commit error. That Section provides that the Supreme Court may review by Certiorari any decision of a District Court of Appeal that is in direct conflict with a decision of any District Court of Appeal or of the Supreme Court on the same question of law.

As recognized by Justice Irwin in his dissenting opinion in *Scholastic Systems, Inc., et al vs. LeLoup, et al*, supra, if this Honorable Court strictly adheres to the rule that it established in that case, litigants in workmen's compensation cases will have a lessened appellate review than other litigants in the State of Florida. Since there is only one Industrial Relations Commission, there is no possibility that its opinions will be in conflict with another court of equal status and, therefore, its "findings of fact" and the application of the law to those findings of fact will become absolute and final. That would be, if it is not already, an intolerable burden to thrust upon the litigants in workmen's compensation cases.

4. Long prior to 1971, the Supreme Court stated what it considered to be the proper measure of appellate review. In the case of *U. S. Co. vs. Maryland Casualty Co.* 55 So.2d 741, (Fla. 1951)) the Court said:

> "The Deputy Commissioner's findings of facts should be upheld unless there is no competent, substantial evidence which accords with logic and reason to sustain them."

That statement of the law was reaffirmed in *Hastings vs. City of Fort Lauderdale Fire Department*, 178 So.2d 106, (Fla. 1965) and then this Court made the following statement:

> "It was not, however, the duty of, nor is it appropriate for, the Full Commission or this Court to re-weigh or re-evaluate the testimony. Both bodies should examine the record and determine only if the findings of facts and the compensation order entered by the Deputy are sustained by competent, substantial evidence."

This Court clearly stated the limited function of the reviewing authority in *Herring vs. Jackson Bearing & Supply, Inc.*, 212 So.2d 768, (Fla. 1968) when this Court made the following statement:

> "While we personally might have arrived at factual findings contrary to those of the Deputy, we remind ourselves, and the Respondent Commission, that this is not the measure of appellate review."

In spite of the clear and unambiguous language of the Supreme Court as to the proper measure of appellate review, this Honorable Court has been compelled to intervene and grant Petitions for Writ of Certiorari in the following cases where the Industrial Relations Commission has since the upgrading of the status of the Industrial Relations Commission to the level of an appellate court, re-weighed and re-evaluated the evidence and then sub-

stituted its view of the evidence for that of the Judge of Industrial Claims: *Howard vs. Green's Tractor Co.*, 290 So.2d 46, (Fla. 1974); *Honeywell, Inc., vs. Scully*, 289 So.2d 393, (Fla. 1974); *Riddle vs. Brevard County Board of Public Instruction*, 286 So.2d 559, (Fla. 1975); *Southern Convalescent Home vs. Wilson*, 285 So.2d 404, (Fla. 1975); *Henderson vs. Booth*, 281 So.2d 350, (Fla. 1973); *Adams vs. Sun Gold Septic Tank, Inc.*, 272 So.2d 499, (Fla. 1972); and *Cooper vs. Florida Department of General Services*, 269 So.2d 366, (Fla. 1972).

Furthermore, in cases too numerous to cite in this Petition for Rehearing, the Supreme Court has, since 1971, been forced to intervene in workmen's compensation cases by granting Petitions for Writ of Certiorari where the Industrial Relations Commission has inappropriately applied what it considered the law to be to the facts of the case under consideration. As pointed out by the Petitioner in this cause in its Petition for Writ of Certiorari and in the Briefs that it filed in support thereof, not one of the cases cited by the Industrial Relations Commission in its opinion that it entered reversing the ruling of the Judge of Industrial Claims supports the ruling of the Industrial Relations Commission that there was a casual relationship between the Respondent's employment and the accident that the Respondent sustained. As observed by Justice Boyd during oral argument, it has long been established by the case law of this State that, and in order for an accident to arise out of and in the course of an employee's employment, there must be some casual relationship between the employment and the accident. In *Sanford vs. A. P. Clark Motors*, 45 So.2d 185, (Fla. 50), and in *Johnson vs. Coffee Kettle Restaurant*, 125 So.2d 297, (Fla. 1961), this Court said:

> "It is essential that the claimant prove or show a state of facts from which it may be reasonably inferred that the employee was engaged in his master's business when the accident resulting in his injury took place."

No such evidence existed in this case and, as a matter of fact, the Judge of Industrial Claims, based upon competent and substantial evidence, found that the Respondent was on a purely personal mission when he departed from the premises of the Petitioner and that he had not returned to the Petitioner's premises prior to the happening of the accident and, therefore, that accident did not arise out of and in the course of the Respondent's employment. This ruling was, and is, in complete agreement with the following decisions: *N & L Auto Parts Company vs. Dorman*, 111 So.2d 270, (Fla. 1959), *Everett Ford Company vs. Laney*, 189 So.2d 877, (Fla. 1966) and *Maroney vs. Edward A. Kelly & Sons, Inc.*, 195 So.2d 209, (Fla. 1967). However, and in spite of that state of the law, the Industrial Relations Commission, after quoting from Shakespeare's *Merchant of Venice*, ruled as a matter of law, that the accident sustained by the Respondent did arise out of and in the course of the Respondent's employment. This Honorable Court has had occasion to comment upon the philosophizing of the Industrial Relations Commission and should again so comment. As this Court said in the case of *Adams vs. Sun Gold Septic Tank, Inc.* 272 So.2d 499, Fla. 1972):

> "As we have at times reminded the Commission, it is not expected to stray into philosophical or conceptual thickets relating to the need and wisdom of workmen's compensation; rather, it is to review its cases in the light of governing law and precedent."

Obviously, in the instant cause the Industrial Relations Commission did not review this cause in the light of governing law and precedent and such action on the part of the Industrial Relations Commission constitutes a departure from the essential requirements of law and constitutes a departure from the standard of appellate review.

As clearly established by the record in this cause, the Industrial Relations Commission did re-weigh and re-evaluate the evidence and did substitute its view of the evidence for that of the Judge of Industrial Claims and the Industrial Relations Commission also failed to correctly apply the applicable law to the facts of this case as determined by the Judge of Industrial Claims, resulting in a legal result that is in direct conflict with the decisions previously entered by this Honorable Court on that point of law. It is respectfully suggested that when it affirmatively appears from the record that the Industrial Relations Commission has re-weighed and re-evaluated the testimony and has substituted its view of the testimony for the view of the Judge of Industrial Claims or when it affirmatively appears that the Industrial Relations Commission achieves a legal result in conflict with the legal result in a similar case previously achieved by the Supreme Court of Florida, either of those actions by the Industrial Relations Commission must be considered as constituting a departure from the essential requirements of law and that under those circumstances this Honorable Court should, in the exercise of its sound judicial discretion, grant a Petition for Writ of Certiorari.

5. One cannot deny that this Honorable Court is overloaded and overworked and that this situation has existed for many years. However, that fact cannot be justification

for this Court abdicating its jurisdiction in workmen's compensation cases and giving to the injured workman and to industry a lessened quality of justice than is given to other litigants in the State of Florida and by placing appellate review solely in the hands of an administrative reviewing authority which has clearly demonstrated, in spite of legislative "upgrading", that is has been unable or unwilling to extend to litigants the proper measure of appellate review. As previously pointed out, since 1971, the year in which the upgrading of that administrative reviewing authority began, that administrative reviewing authority has, time and time again, failed to properly, and within the framework of appellate review, review workmen's compensation cases pending before it. Litigants, when confronted with inadequate appellate review, must have some recourse to the courts. The rule of law as established by this Court in *Scholastic Systems, Inc., et al vs. LeLoup, et al*, supra, if strictly enforced by this Court, denies litigants in workmen's compensation cases adequate and meaningful appellate review.

For the foregoing reasons, it is respectfully submitted that this Honorable Court should reconsider its opinion entered in this cause on October 24, 1974; that this Honorable Court should vacate that Order; and that this Honorable Court should grant the Petitioners' Petition for Writ of Certiorari.

JAMES T. EARLE, JR.

EARLE, YANCHUCK & COOPER, P.A.
500 First Avenue North
St. Petersburg, Florida 33701
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Petitioners' Petition for Rehearing have been mailed this 18th day of November, 1974, to Kenneth Hart, Esq., attorney for the Industrial Relations Commission, and Dudley Burton, Esq., attorney for Matthew P. Cunningham.

JAMES T. EARLE, JR.
Attorney

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1975
TUESDAY, JANUARY 28, 1975

CASE NO. 44,546

SCOTTY'S HOME BUILDERS AND
GENERAL INSURANCE COMPANY OF AMERICA,
Petitioners,

versus

MATTHEW P. CUNNINGHAM AND THE
INDUSTRIAL RELATIONS COMMISSION,
Respondents.

On consideration of the Petition for Rehearing filed by attorney for petitioners,

IT IS ORDERED that said petition is denied.
ADKINS, C.J., ROBERTS, McCAIN and OVERTON, JJ., and ERVIN, Ret. J., concur

A True Copy

TEST:

Y
CC: Hon. Verna Martin, Clerk
Hon. James T. Earle
Hon. Dudley Burton

SID J. WHITE,
Clerk Supreme Court.

Supreme Court, U. S.
FILED
JUN 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1355

SCOTTY'S HOME BUILDERS AND GENERAL INSURANCE COMPANY OF AMERICA,

Petitioners,

versus

MATTHEW P. CUNNINGHAM AND THE INDUSTRIAL RELATIONS COMMISSION,

Respondents.

BRIEF OF RESPONDENT MATTHEW P. CUNNINGHAM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DUDLEY BURTON
Sanibel, Florida 33957
Attorney for Respondent
Matthew P. Cunningham

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1355

SCOTTY'S HOME BUILDERS AND GENERAL INSURANCE COMPANY OF AMERICA,

Petitioners,

versus

MATTHEW P. CUNNINGHAM AND THE INDUSTRIAL RELATIONS COMMISSION,

Respondents.

BRIEF OF RESPONDENT MATTHEW P. CUNNINGHAM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent, Matthew P. Cunningham, respectfully submits that a writ of certiorari should not issue to the Supreme Court of Florida to quash their orders as contended by Petitioners, because the Court below, has fully considered and adjudicated this workmen's compensation case on the merits.

OPINIONS AND ORDERS BELOW

The Respondent respectfully disagrees with the statement by Petitioners that the order of the Florida Supreme Court in this cause denied them their constitutional rights. The legal reasons therefor appear under the argument of this Respondent.

JURISDICTION

This Respondent respectfully submits that Petitioners have shown no grounds for this Court to issue a Writ of Certiorari to review the order of the Supreme Court of Florida in this cause.

QUESTION PRESENTED

Whether a Writ of Certiorari should issue to the Supreme Court of Florida to quash its adjudication of affirmance of a workmen's compensation order of the Florida Industrial Relations Commission, where said Court considered . . . "the transcript of record and briefs and argument of counsel for the respective parties" . . . (Petitioners' Brief page 35 Appendix C)

CONSTITUTIONAL PROVISION INVOLVED

This Respondent respectfully alleges that there is no constitutional provision involved since there has been no violation of any section of the Federal or State Constitution in this cause.

STATEMENT OF THE CASE

This Respondent agrees in essence with the statement of the case as set out by the Petitioners except that the

holding below of the Industrial Relations Commission of Florida was omitted. That body held that the claimant, "a paraplegic", was entitled to . . . "an Order of Compensability" under the Florida Workmen's Compensation Law. (Petitioners' Brief pages 24 and 27, Appendix B)

REASONS FOR NOT GRANTING THE WRIT

The main thrust of Petitioners' argument is the allegation that they have not had their "day in court" before the Florida Supreme Court in connection with their Petition for Certiorari before that tribunal. The record in this cause, the court decisions, and the law of the State of Florida do not support the above contention. This cause was adjudicated by the Florida Supreme Court in the same manner as several hundred other Petitions for Certiorari in workmen's compensation proceedings since the present Statute was amended in 1953. Prior to the amendment of 1953 Section (1) of F.S. 440.27 provided in workmen's compensation cases that:

> "Either party may appeal as a matter of right."

The legislature in 1953 changed this method of review and provided:

> "Orders of the full Commission entered pursuant to Section 440.25 of this chapter shall be subject to review ONLY by petition for writ of certiorari filed in the Supreme Court of Florida . . ." (Chapter 28241, Laws of Florida, Act of 1953, F.S. 440.27 sub-paragraph (1)) (Emphasis ours)

In a unanimous decision by the Florida Supreme Court construing the constitutionality of the above 1953 amendment, the Court held.

> "It is plain that reviews of decisions of the Industrial Commission may no longer be presented in an out-and-out appeal, the provisions for such relief having been repealed by the legislature, and parties dissatisfied with decisions of the commission must now find solace in the extraordinary writ of certiorari.
>
> * * *
>
> We conclude on the main point that no guaranty of organic law was violated by the act and that henceforth parties to procedure before the Industrial Commission for the settlement of claims must be content with certiorari as a means of obtaining review of the commission's decision." Wilson v. McCoy Mfg. (Fla. 1954) 69 So.2d 659.

The *Wilson* case, *supra*, is still the law of Florida today twenty-one years later and has not been reversed or modified by the Florida Supreme Court. The Court went on to hold in the *Wilson* case, *supra*, that the legal test on certiorari in workmen's compensation proceedings would be that:

> "The petitioner will carry the burden of showing that the order challenged is illegal or unauthorized or does not accord with the essential requirements of the law * * *" Wilson v. McCoy Mfg. Co. (Fla. 1954) 69 So.2d 659.

The above stated appellate test is precisely the test that the Florida Supreme Court used in the instant cause in their judicial review of the Petition for Certiorari in this case. In their Order below they held:

> ". . . the Court FINDING NO DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW, it is ordered that said petition be and

> the same is hereby denied." (Petitioners' Brief page 35 Appendix C) (Emphasis Ours)

The following per curiam decisions in workmen's compensation cases picked at random from the official reports of 1973, 1974 and 1975 indicate the above pattern of certiorari review has been followed consistently by the Florida Supreme Court.[1]

As shown in Appendix I, (Respondent's Brief page 14) the Florida Supreme Court set this cause for oral argument before five members of the Court on September 13, 1974. Each side was granted 20 minutes for oral argument on the merits. Under Appellate Rule 3.10 (e), oral argument before the Florida Supreme Court is discretionary. It has been our observation over the past 27 years that oral argument in workmen's compensation proceedings is rarely

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[1] See: *Schlosberg v. Big "K" Distributors*, 308 So.2d 113 (Fla. 1975); *Highsmith v. National Airlines, Inc.*, 308 So.2d 112 (Fla. 1975); *Santos v. City Homes, Inc.*, 308 So.2d 113 (Fla. 1975); *Balido v. Allstate Insurance Company*, 308 So.2d 112 (Fla. 1975); *William M. Schneider, Inc. v. Shifrin*, 308 So.2d 117 (Fla. 1975); *Seacoast Transportation Company v. Perez*, 308 So.2d 537 (Fla. 1975); *Downey v. General Accident & Life Assurance*, 308 So.2d 537 (Fla. 1975); *Coconut Grove Prep School v. Fisher*, 290 So.2d 63 (Fla. 1974); *Harders Construction Company, Inc. v. Sanders*, 290 So.2d 63 (Fla. 1974); *General Development Corp. v. Burge*, 285 So.2d 21 (Fla. 1973); *Munoz v. Florida Department of Commerce, Industrial Relations Commission*, 289 So.2d 792 (Fla. 1974); *Hyatt v. Southco Industries, Inc.*, 289 So.2d 737 (Fla. 1974); *Miami Herald Publishing Company v. Fernandez*, 285 So.2d 19 (Fla. 1973); *Burris v. Duricin Division*, 284 So.2d 397 (Fla. 1973); *Rivermont Corporation v. Fairbanks*, 289 So.2d 738 (Fla. 1974); *LaGrow Irrigation System, Inc. v. Stoker*, 289 So.2d 738 (Fla. 1974); *Ray Construction Company v. Turner*, 284 So.2d 395 (Fla. 1973); *John W. Thomson & Son, Inc. v. Jeziorski*, 289 So.2d 732 (Fla. 1974); *Ocean Products, Inc. v. Gordon*, 285 So.2d 618 (Fla. 1973); *Andrews v. Robinson*, 284 So.2d 394 (Fla. 1973); *Fleming v. Florida Portland Cement Division Travelers Insurance Company*, 285 So.2d 617 (Fla. 1973); *Duffey Construction Company v. Russell*, 285 So.2d 614 (Fla. 1973); *Palm Beach County Board of County Commissioners v. Sims*, 284 So.2d 393 (Fla. 1973); *Champion Mobile Homes v. Chaney*, 285 So.2d 416 (Fla. 1973); *Winter Garden Citrus Products v. Arnold*, 285 So.2d 415 (Fla. 1973); *Wiggs & Maale Construction Company v. Green*, 284 So.2d 224 (Fla. 1973); *Pennsuco Aggregates, Inc. v. Burkhalter*, 284 So.2d 393 (Fla. 1973).

granted. For the Petitioners to allege, therefore, that they have not had a constitutional guarantee of due process in the proceedings below is a mistatement of the procedural facts in this cause.

Assume arguendo that the *LeLoup* decision,[2] relied on by Petitioners in their Brief, may be used for a collateral attack in this proceeding. This Respondent does not read the decision of the Florida Supreme Court in *LeLoup* to say, as alleged by Petitioners, that a petitioner in a workmen's compensation proceeding before the Florida Supreme Court no longer has a judicial review of his case. Justice Dekle in speaking for six of the seven members of the Florida Supreme Court in *LeLoup* stated:

> "The review contemplated by Article V continues in the Florida Supreme Court but only on the basis of certiorari demonstrating a departure from the essential requirements of law, although such petition and briefs can submit and argue together the contended jurisdiction and merits without, necessarily, first submitting the matter separately on jurisdiction. Either way, the submission of the record and any testimony should now be substantially reduced.
>
> * * *
>
> IRC cases shall hereafter be reviewed by this Court upon traditional certiorari grounds based upon a departure from the essential requirements of law, rather than upon general appellate considerations." Scholastic Systems, Inc. v. LeLoup (Fla. 1975) 307 So.2d, 166.

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[2] It is legally significant that Justice Ervin, whose dissenting opinion in *LeLoup* is relied on and quoted extensively by Petitioners at pages 5, 6, 10 and 11 of their brief, voted with three other Justices in this cause to affirm the holding of compensability by the Florida Industrial Relations Commission below. (Petitioners Brief page 36 Appendix C)

Although there are 50 state workmen's compensation statutes plus a Federal Compensation Law the Petitioners have cited no workmen's compensation case from any jurisdiction to support their contention of a violation of due process in the appellate review in this cause. Petitioners in alleging that they were entitled to certiorari as a matter of right below cite cases from New Jersey and Rhode Island. The *Carlson* case cited by Petitioners at page 7 of their Brief involved a police officer that had been discharged for moral turpitude at a hearing before the Bureau at which he appeared with counsel. Thereafter a retroactive statute was passed by the legislature allowing parties to file a verified petition in proceedings similar to *Carlson's* requesting review by certiorari to a trial justice of the superior court. The question before the Supreme Court of Rhode Island was whether this statute entitled Petitioner: (1) a full review both as to the law and the facts or (2) a review by certiorari only. The Supreme Court of Rhode Island in construing this act merely held that Petitioner's procedural right was by certiorari and not by full review.

The *Gallena* decision cited by the Petitioners at page 7 of their Brief considered the interpretation of a new state constitution. The Supreme Court of New Jersey held that a one to one tie vote on a prior petition under the old constitution was merely a declination of jurisdiction of the matter in controversy and not an adjudication of the merits. Neither of the above cited cases by Petitioners are remotely related to the facts and procedures in the instant case.

Finally, petitioners alleged that Section 120.68 F.S. (Florida's new Administration Procedure Act) gives a

party in a workmen's compensation proceeding review by certiorari as a matter of right. (Petitioners' Brief page 9) Assuming arguendo that Petitioners argument is correct this offers no solace to the Petitioners. The plain wording as to the effective date of Section 120.68 F.S., supra, is January 1, 1975. (See Respondent's Brief page 16 Appendix II) The Order of Affirmance of the Supreme Court of Florida in this cause was entered by that Court on November 8, 1974 or almost two months before the section relied on by Petitioners was on the books! (See Petitioners' Brief page 35 Appendix C)

Obviously because of its newness the Florida Supreme Court has not had the opportunity to rule on the application of this section of the Administrative Procedure Act. The Court below has ruled relative to alternative methods of review in workmen's compensation proceedings in connection with the Uniform Appeals Act. In a case construing that act, enacted in 1945 by the Florida Legislature, the appellant contended that the Uniform Appeals Act provided an alternative method of appeal in workmen's compensation proceedings. In denying this contention, the Florida Supreme Court held:

> "From the history of the Workmen's Compensation Act, recounted above, it is apparent that in this particular class of cases it is the policy of the Legislature to provide a speedy method of appeal in order to secure to injured workers as quickly as possible the compensation provided for them under the Act and upon which they and their families must depend for food and shelter during the period of disability of the wage earner. To effect a change in this established and salutary policy would seem to require an express legislative mandate, directed specifically to appeals in workmen's compensation cases. This, the 1945 Uniform Appeals Act did not do."

Smith v. Fletcher Motor Sales (Fla. 1953) 62 So.2d 60.

CONCLUSION

This case has been in litigation three years, with three different sets of attorneys representing the Petitioners, at three levels. During this period this young paraplegic has been without medical or compensation benefits as provided by the Florida Workmen's Compensation Law. This law provides, as do most state acts, that proceedings shall be determined in a summary manner, that all doubts should be resolved in favor of the claimant and that technical rules or procedure should not prevail. (F.S. 440.25 (3)(b); 440.29(1); and 440.26) If any constitutional rights have been violated they are those of the Respondent, Cunningham, in this long drawn out proceeding. The Florida Supreme Court in speaking through then Chief Justice Drew stated concerning the constitutional importance of speedy benefits in workmen's compensation proceedings that:

> "Unreasonable and unjustifiable delays in the administration of justice in criminal and civil cases are condemned in section IV of the Declaration of Rights of the Florida Constitution, F.S.A. THIS SECTION OF THE CONSTITUTION IS PARTICULARLY APPLICABLE TO COMPENSATION CASES. The act is designed to afford a speedy and summary disposition of claims and we know the working man ordinarily cannot afford to wait indefinitely to receive compensation for himself and his family when he has been injured

and forced to quite work." Blount vs. State Road Dept. (Fla. 1956) 87 So.2d 507 (Emphasis Ours).

It is therefore respectfully urged by this Respondent that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

DUDLEY BURTON
P. O. Box 213
Sanibel, Florida 33957
Attorney for Respondent
Matthew P. Cunningham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Edna L. Caruso, P. O. Drawer 3626, West Palm Beach, Florida, 33402, Attorney for Petitioners, and Mrs. Verna Martin, Industrial Relations Commission, Ashley Building, 1321 Executive Center Drive, Tallahassee, Florida, by mail, this ..... day of ....., 1975.

By: .....
Dudley Burton

APPENDIX I

CASES FOR ORAL ARGUMENT
Friday, September 13, 1974—9:30 o'clock a.m.
Five Man Court

45,447
THE STATE OF FLORIDA,
Petitioner,
versus
ROBERT MILLER WOLFF, JR.,
Respondent.

Robert L. Shevin, Attorney General
William L. Rogers, Asst. Atty. General
1350 N. W. 12th Ave., Miami
Appleton & Ernest, 6161 Overseas Highway, Marathon
Robert S. Appleton, Marathon
(MAXIMUM OF TWENTY MINUTES TO THE SIDE)

44,908
PAUL EUGENE CUMMINGS,
Petitioner,
versus
DOROTHY JUNE CUMMINGS,
Respondent.

Parker, Battaglia, Parker, Ross & Stolba,
3835 Central Ave., St. Petersburg
Michael L. Hastings, St. Petersburg
Antinori, Cohen & Thury,
406 N. Morgan St., Tampa
Ann Loughridge Kerr, 725 E. Kennedy Blvd., Tampa
(MAXIMUM OF FIFTEEN MINUTES TO THE SIDE)

45,356

SAUL GOODMAN,

Petitioner,

versus

RICHARD H. OLSEN,

Respondent.

Law Offices of Leo Greenfield
1680 N. E. 135th St., North Miami
Prunty, Ross, DeLoach & Olsen
837 City National Bank Bldg., Miami
John W. Prunty, Miami

(MAXIMUM OF FIFTEEN MINUTES TO THE SIDE)

44,546

SCOTTY'S HOME BUILDERS, ET AL.,

Petitioners,

versus

MATTHEW P. CUNNINGHAM, ET AT.,

Respondents

Earle, Yanchuck & Cooper
500 First Ave. North, St. Petersburg
James T. Earle, St. Petersburg
Burton & Burton, 1008 Concord Bldg, Miami
Dudley Burton, Miami

(MAXIMUM OF TWENTY MINUTES TO THE SIDE)

APPENDIX II

under consideration or a factually-related matter; or

(b) A party to the proceeding, or any person who directly or indirectly would have a substantial interest in the proposed agency action or his authorized representative or counsel.

(c) Nothing in this section shall apply to an advisory staff which does not participate in the proceedings or to rule-making.

(2) A hearing officer who is involved in the decisional process, and who receives an ex parte communication in violation of subsection (1), shall place on the record of the pending matter all written communications received, a memorandum stating the substance of all oral communications received, all written responses to the communication, and a memorandum stating the substance of all oral responses made and shall also advise all parties that such matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, if such party requests the opportunity for rebuttal within ten days after notice of such communication. The hearing officer may, if he deems it necessary to eliminate the effect of an exparte communication received by him, withdraw from the proceeding, in which case the division shall assign a successor.

(3) Any person who makes an exparte communication prohibited by subsection (1) and any hearing officer who fails to place in the record any such communication is in violation of this act and may be assessed a civil

penalty not to exceed $500 or by such other disciplinary action as his superiors may determine.

Laws 1974, c. 74-310, § 1.

Laws 1974, c. 74-310, was approved by the Governor June 25, 1974. Section 6 of the Act provided that all sections of this Act "shall take effect January 1, 1975," except §§ 11.60, 120.54(9), and 120.65, which "shall take effect October 1, 1974."

120.68 Judicial review

(1) A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2) Except in matters for which judicial review by the supreme court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency mantains its headquarters or where a party resides. Review proceedings shall be conducted in accordance with the Florida appellate rules.

(3) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(4) Judicial reveiw of any agency action shall be confined to the record transmitted, and any additions made thereto in accordance with subsection (7).

Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1355

SCOTTY'S HOME BUILDERS
and
GENERAL INSURANCE COMPANY
OF AMERICA,
Petitioners,

v.

MATTHEW P. CUNNINGHAM
and
THE INDUSTRIAL RELATIONS
COMMISSION,
Respondents.

REPLY BRIEF FOR PETITIONERS

Edna L. Caruso
Howell, Kirby, Montgomery
D'Aiuto and Dean
P. O. Drawer 3626
West Palm Beach, Florida 33402
Attorneys for Petitioners

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CITATION OF AUTHORITIES

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Millis v. McCann Hardware (Fla.1972) 278 So.2d 278	2
Lehman v. Goodwin IRC Decision 2-2090	2
Scholastic Systems, Inc. v. Leloup (Fla.1975) 307 So.2d 166	3
Ziffrin, Inc. v. United States, 318 US 73, 63 S.Ct. 465	1

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MATTHEW P. CUNNINGHAM
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THE INDUSTRIAL RELATIONS
COMMISSION,
Respondents.

REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents' argument that Florida's new Administrative Procedure Act is not applicable is clearly without merit. A very basic tenet of Appellate review is that the law existing at the time of the Appeal is applicable. *Ziffrin, Inc.* v. *United States*, 318 US 73, 63 S.Ct. 465. Hence, Florida's Administrative Procedure Act is controlling in the present case.

The unconstitutionality of the Florida Supreme Court's holding that judicial review by certiorari of decisions of the Industrial Relations Commission is not a matter of right is compounded by the existence of three other Florida decisions:

1. *G & H Contracting Co.* v. *Hale*, IRC Decision 2-2688, filed August 21, 1974, held that a claimant has no *right* to file a claim for compensation, in the sense that he will be penalized for filing a claim where he is being paid temporary total disability benefits, where all medicals are being provided and where there is no dispute between the parties.

2. *Millis* v. *McCann Hardware* (Fla.1972) 278 So.2d 278 discloses that Florida Appellate Rule 3.10(e) which allows an appellate court to dispense with oral argument is applicable to workmen's compensation cases. Therefore, if an appeal is taken to the Industrial Relations Commission from a decision of a Judge of Industrial Claims, the case can be decided by the Commission without ever having heard oral argument by the parties. Thereafter, even if the Florida Supreme Court does review an appeal from the decision of the Industrial Relations Commission on the merits, it can again do so and affirm, reverse or whatever without permitting the parties to orally argue the case. Thus, the entire appellate process can be completed without having given the parties an opportunity to ever appear and orally argue the case.

3. *Lehman* v. *Goodwin*, IRC Decision 2-2090, filed August 17, 1972, held that an interlocutory order of the Judge of Industrial Claims is not subject to appeal. However, there is no provision made for preserving any objection a party might have to an interlocutory order.

In light of the above cases, the *Scholastic Systems, Inc.* v. *Leloup* decision (Fla.1975) 307 So.2d 166 becomes much more harsh than would appear at first blush. It can be seen that already a claimant: (1) has no right to file a workmen's compensation claim without being able to show that particular circumstances exist; (2) thereafter, neither party can appeal an interlocutory order of the Judge of Industrial Claims although there is no provision for preserving objection to the order; and (3) even when an appeal from a final order is heard by the Industrial Relations Commission and thereafter the Florida Supreme Court, oral argument can be denied at either level. Now, pursuant to *Leloup* there is no *right* to judicial review by the Florida Supreme Court at all.

It is evident that the *Leloup* decision becomes much more restrictive in light of the above decisions. Accordingly, the right to any kind of review, administrative or judicial, of a workmen's compensation case in Florida is virtually nonexistant.

CONCLUSION

For reasons stated here and in the petition, the petition should be granted.

Respectfully submitted,

Edna L. Caruso
Howell, Kirby, Montgomery,
D'Aiuto and Dean
P. O. Drawer 3626
West Palm Beach, Florida 33402
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Dudley Burton, P. O. Box 213, Sanibel, Florida, 33957, Attorney for Respondent Cunningham, and Mrs. Verna Martin, Industrial Relations Commission, Ashley Building, 1321 Executive Center Drive, Tallahassee, Florida, 32301, by mail, this.....day of....., 1975.

By.....
EDNA L. CARUSO